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### KEY QUESTIONS TO ASK VENDORS WHEN BUYING TECHNOLOGY

#### CALIFORNIA COUNTIES INFORMATION SERVICES DIRECTORS ASSOCIATION 2003 SPRING CONFERENCE APRIL 8, 2003

#### I. Introduction.

From a buyer's or software licensee's perspective, vendor agreements for the sale or licensing of technology are fundamentally biased against a buyer. In contrast, vendors will argue their agreements are designed to reflect the types of business arrangements that the vendors are willing to offer (at least initially) at the prices reflected in the agreements.

However, in any transaction where a buyer has some bargaining power, the buyer can revise the vendor's standard agreement to add balance and address some, or perhaps all, of the buyer's concerns. The revision process can take many paths; sometimes the parties just meet for several long and painful days to argue about how to negotiate changes to the vendor's model agreement. In other situations, the buyer proposes revisions to the agreement by editing the document, drafting an amendment or proposing conceptual changes in a memorandum or list. Or, the buyer discards the vendor's agreement and drafts its own agreement which the vendor then has to revise. All of these approaches can take significant amounts of time and generate large legal fees.

An alternative approach that can save time and money involves asking the vendor key questions about how the vendor will address the buyer's concerns in the specific transaction before the parties engage in contract negotiations. These key questions can allow the vendor to compromise in writing before the buyer takes any action in response to the vendor's model and may provide a mechanism for the vendor to explain how this buyer and its transaction differ from all the others that only require the model agreement. They can also avoid contentious negotiations over every provision in the vendor agreement and flushes out the vendor's willingness to compromise on big issues in the relationship before the buyer spends lots of money on legal fees.

The following key questions should be used as a tool for accelerating and improving the contract negotiation process. Note that a buyer should receive a "Yes" answer to each question. If the answer to the question is "No," then the parties know they need to address the response.

The questions are most effective when submitted in advance to a vendor, either as part of an RFP process or after a vendor has been determined by the buyer to ostensibly be the best choice. The vendor should answer the questions in writing so that the buyer can review the answers and meet internally to decide whether it wants to continue to negotiate with the seller or choose another vendor. Then, if the buyer goes forward with the negotiations, the key questions and the vendor's answers can serve as the basis for negotiating resolutions to the most significant points of contention in a technology agreement. A buyer could also use these key questions as a script during a negotiation process to attempt to discuss and resolve significant issues in the transaction.

In every negotiation, there are unique concerns and issues that the parties have to address. Therefore, these key questions will have to be supplemented or tailored to fit your specific context. However, they can provide a framework for negotiations before pursuing many other paths that can result in unnecessary costs and delays.

## **II. Key Questions**

### **A. Project Management.**

1. Will there be a firm, detailed work schedule that is incorporated into the contract as an exhibit?
2. Will changes to the work schedule be subject to mutual agreement?
3. Will the vendor provide any project management services such as a project manager, regular reports and participation in regular meetings?
4. Will the reports and meetings at least be weekly?
5. Do you get to approve and reject proposed personnel to work on your project (particularly if vendor personnel will work on site at your location)?
6. Have you received full information regarding any hardware, networking or other equipment requirements from the vendor in order to use the deliverables and any environmental conditions that must be provided for the deliverables?

7. Will the vendor produce deliverables, such as designs, software customizations, software or systems, or other products of the services?

**B. Deliverables and Testing.**

1. Will the deliverables conform to and operate in accordance with applicable specifications, documentation, and laws and regulations (collectively "specifications") during the acceptance tests?
2. Will you have the right to review, test and accept or reject each deliverable if it fails to meet specifications?
3. If a deliverable is rejected, will you have the right to elect to:  
(a) have the vendor correct the unacceptable deliverable and represent the deliverable for another review by you; or (b) receive a prompt refund of all amounts that you previously paid for that deliverable?
4. If that deliverable is ultimately rejected, will you also be entitled to return other previously accepted deliverables and receive a refund for those deliverables?
5. If that deliverable is ultimately rejected, will you also have the right to terminate the agreement?

**C. Specifications.**

1. If you issued a request or proposals, will it be included as part of the specifications?
2. If a proposal was submitted by the vendor, will it be included as part of the specifications?
3. Will the agreement also include in the definition of specifications proposals, marketing brochures, correspondence and performance standards (uptimes, system response times, and service response times) that were used as part of the basis of your decision to purchase from this vendor?

**D. Services.**

1. If you are expecting the vendor to provide any installation, implementation, and/or data conversion services, has the vendor provided a detailed description of those services?
2. Will the vendor be providing training for the software?

3. If so, are you receiving the user, administrative and/or technical training that you need?
4. Is additional training available to you if you request it?
5. Will the vendor's maintenance and support service commitments include performance standards for responding to critical inquiries, using sufficient resources to resolve critical issues, and escalating unresolved technical problems quickly enough?

**E. Licensing and Proprietary Rights.**

1. Does the license grant allow you the perpetual right to use the software in the way that you plan and other necessary rights, e.g., the right to distribute, copy or modify; use by your affiliates; and/or a sufficient number of sites or users?
2. Will you own all deliverables and other products of the services?
3. If the vendor will be developing any custom software for you, will you own it?
4. If you won't own it, will you be receiving some other benefit, e.g., reduced license fees or free support, since you are financing development of new product for the vendor?
5. Will the vendor maintain the confidentiality of information and materials that you provide to it or that it becomes aware of through its performance under the agreement, including the deliverables it produces as designs?
6. Will source code for the applications software initially be licensed to you or deposited in an independent escrow arrangement?
7. If the source code is in an escrow arrangement, can you receive if the vendor fails to provide support services, goes into bankruptcy proceedings and similar events?
8. Will the vendor provide software enhancements and updates to you at no additional cost?

**F. Warranties and Remedies for Breach of the Warranties.**

1. Will the vendor warrant that each deliverable will perform in accordance with the specifications?

2. Will the remedy for breach of this warranty be for the vendor to promptly repair or replace the defective deliverable at no additional cost?
3. If the vendor is unable to repair or replace a defective deliverable within a certain time period, i.e., during a warranty period, can you terminate the agreement and receive a refund of amounts previously paid?
4. Will the deliverables be warranted to comply with particular business concerns or regulatory issues that apply to your business and this project?
5. Will the vendor warrant that the deliverables will not infringe upon or misappropriate any intellectual property rights of any third party?
6. Will the vendor warrant that the deliverables are "Year 2000," i.e., date/time, compliant?
7. Will the vendor warrant that there are no viruses, bombs or other disabling mechanisms in the deliverables?
8. Will the vendor warrant that the required equipment will be compatible with the software and sufficient for the full use of the software in accordance with specifications, as it is updated, enhanced and customized?
9. Will the vendor warrant that its services will be performed in a professional manner with high quality?
10. Will the remedy for breach of this warranty be for the vendor to reperform the services at no additional cost to you?
11. Will the vendor warrant that time will be of the essence for performance of the services?
12. Will the vendor provide free equipment if the recommended equipment is insufficient to operate the software in accordance with specifications?

**G. Financial Obligations and Remedies.**

1. If the vendor fails to perform its obligations in accordance with mutually agreed upon performance standards, do you receive credits, e.g. a percentage of monthly services fees for each hour the services are not timely performed or other time period the software is unavailable?

2. If there will be an acceptance testing schedule for deliverables, will you have the right to receive liquidated damages to compensate you for each day that the vendor fails to receive acceptance for the deliverable?
3. Will you pay for deliverables on a milestone basis, e.g., after delivery, installation, acceptance, and performance of the deliverables in accordance with their specifications for 30 consecutive days after acceptance?
4. Will at least 20% of payments for deliverables be reserved to acceptance of the deliverable(s)?
5. Will services that are not included as part of a deliverable be paid for after being satisfactorily completed?
6. Will satisfactorily completed services be billed monthly?
7. Will you have the right to withhold payments otherwise due or reduce the amount of payments if the vendor fails to perform its obligations or in the event you have any claims for damages?
8. Will undisputed payments be due within 30 days of your receipt of a correct invoice?
9. If you will reimburse any of the vendor's expenses, is your prior written approval required or a dollar limit imposed on the expenses that will be reimbursed?
10. Are sales and use taxes the only taxes that you will pay?
11. Will the vendor indemnify you for any claim of infringement or misappropriation of intellectual property rights?
12. If there is a claim that the deliverables are infringing, will the vendor obtain the rights to continued use of the software or provide a substitute of functionally equivalent non-infringing deliverable?
13. If vendor is unable to do so within a reasonable time, can you terminate the agreement and receive a refund of all fees paid?
14. Will the vendor indemnify you for damages caused by its negligence or willful misconduct?

## **H. Indemnities and Damages.**

1. Will the vendor indemnify, defend and hold you harmless for any claim of personal injury or death or property damage caused by the vendor or persons acting on behalf of the vendor?
2. Will each party limit its liabilities?
3. Will indemnities and damages from breach of confidentiality and intellectual property infringement claims be carved out of the damages limits and disclaimers?
4. Will the vendor have minimum insurance in place to protect against bodily injury and property damage, motor vehicle liability and professional liability, including errors and omissions liability?
5. Do you have the right to assign the agreement to others or at least to any subsidiary, parent, or affiliate corporation or any person or entity that acquires all or substantially all of your assets or stock, or pursuant to a merger?
6. Will the terms of the agreement be governed by and interpreted in accordance with the laws of the State where your/their offices are located?
7. Will you and the vendor attempt in good faith to resolve any contract disputes before pursuing any available legal and equitable remedies?
8. Will the exclusive location of litigation between the parties, i.e., venue, be the city or county where your main offices are located?
9. Do you have the right to audit the vendor's books and records with regard to any deliverables or services provided?

Will you be able to terminate the vendor's services at your convenience, subject to payment for services satisfactorily performed prior to the date of termination?

